MALAYSIA AIR CHARTER COMPANY SDN BHD

v.

PETRONAS DAGANGAN SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-308-1996]
6 JANUARY 2000

COMPANY LAW: *Winding-up - Petition - Statutory notice of demand - Whether must quantify interest on judgment sum - Whether failure to quantify interest fatal - Companies Act 1965, s. 218*

The respondent had obtained a default judgment against the appellant and sought to enforce the judgment by serving a statutory notice of demand on the appellant pursuant to s. 218 of the Companies Act 1965 ('the Act').

Upon the appellant's failure to pay, the respondent issued a petition to wind-up the appellant. The appellant disputed the validity of the s. 218 notice on the ground that the sum to be paid was not clearly specified and quantified. The notice had demanded payment of the judgment sum together with interest at the rate of 8% per annum from 28 October 1998 to the date of payment. The High Court ordered the winding-up of the company but the order was stayed pending appeal.

The issue before the court was whether s. 218(2)(a) of the Act was to be interpreted literally and strictly or liberally and widely.

Held:
Per Shaik Daud Ismail JCA

[1] The purpose of the statutory demand was to demand the judgment sum inclusive of the interest, quantified or otherwise, and to warn the appellant that if the sum was not paid within the stipulated period, there would be impending action to recover the debt. Adopting a strict interpretation, the failure to quantify the interest did not render the notice invalid.

[2] Section 218 of the Act only provides that a demand under the hand of the creditor or his authorised agent must be served on the company at its registered address requiring the company to pay the sum due.

[3] In this case, the notice satisfied all the requirements of s. 218(2)(a) of the Act. There was no merit in the argument that the notice was bad because the interest was not quantified. Thus the notice, although it did not quantify the interest due, had strictly complied with the requirements of s. 218(2)(a) of the Act and was a good and valid notice.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memperolehi sebuah penghakiman ingkar terhadap perayu dan cuba menguatkuasakan penghakiman tersebut dengan menyampaikan sebuah notis tuntutan berkanun ke atas perayu selaras dengan s. 218 Akta Syarikat 1965 ('Akta tersebut').

Di atas kegagalan perayu untuk membayar, responden telah mengeluarkan sebuah petisyen untuk menggulung perayu. Perayu mempertikaikan keesahan notis s. 218 atas alasan bahawa jumlah yang perlu dibayar tidak ditentukan dan diperhitungkan dengan jelasnya. Notis tersebut telah menuntut pembayaran jumlah penghakiman bersama dengan faedah pada kadar 8% setahun dari 28hb Oktober 1998 sehingga ke tarikh pembayaran. Mahkamah Tinggi telah memerintahkan penggulungan syarikat tersebut tetapi perintah berkenaan telah digantungkan sementara menunggu rayuan.

Isu di hadapan mahkamah kini adalah mengenai sama ada s. 218(2)(a) Akta tersebut harus ditafsirkan secara harafiah (literally) dan tegasnya ataupun secara bebas dan luasnya.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Tujuan tuntutan berkanun adalah untuk menuntut jumlah penghakiman termasuk faedah, samada yang diperhitungkan atau yang sebaliknya, dan untuk memberi amaran kepada perayu bahawa sekiranya jumlah berkenaan tidak dibayar dalam tempoh yang ditetapkan, akan terdapatnya tindakan untuk mendapatkan kembali hutang tersebut. Dengan menerima-pakai suatu pentafsiran yang tegas, kegagalan untuk memperhitung faedah tidak menjadikan notis berkenaan tak sah.

[2] Seksyen 218 Akta tersebut hanya memperuntukkan bahawa sesebuah tuntutan oleh pemiutang atau ejennya yang diberi kuasa hendaklah disampaikan ke atas syarikat tersebut di alamat berdaftarnya yang menghendaki syarikat tersebut untuk membayar jumlah yang terhutang dan kena dibayar.

[3] Dalam kes ini, notis berkenaan telah menepati kesemua kehendak-kehendak s. 218(2)(a) Akta tersebut. Tidak ada sebarang merit dalam hujah mengenai notis berkenaan tidak sempurna semata-mata kerana faedah tidak diperhitungkan. Oleh yang demikian, meskipun notis berkenaan tidak memperhitungkan faedah yang kena dibayar, ianya telah mematuhi kehendak-kehendak s. 218(2)(a) Akta tersebut dengan tegasnya dan merupakan sebuah notis yang sempurna dan sah.

[Rayuan ditolak.]

Case(s) referred to:

Re Perusahaan Jenwatt Sdn Bhd [1990] 2 MLJ 178 ***(foll)***
Re Willes Trading [1977-78] ACLC ***(foll)***
Re Yap Kim Kee & Sons Sdn Bhd [1990] 2 MLJ 108 ***(foll)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

For the appellant - KS Narayanan (Saranjit Singh with him); M/s KS Narayanan Assoc
For the respondent - YN Foo (Faridah Abdullah & KW Moh with him); M/s Tengku Mohamed & Alan Lim

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D1-28-76-92]

Reported by Anne Khoo

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal by Malaysia Air Charter Co. Sdn. Bhd. (the appellant) against the decision of the High Court given on 6 May 1996 wherein the learned judge ordered the winding-up of the appellant on a petition presented by Petronas Dagangan Sdn. Bhd. (the respondent).

On 18 October 1989, the respondent obtained a judgment in default of appearance against the appellant in the Kuala Lumpur High Court for a sum of RM334,118.79 together with interest thereon at the rate of 8% per annum from 28 October 1988 until date of payment. There was no effort made to apply to have the judgment in default of appearance set aside.

On 16 October 1991, the respondent's solicitors served on the appellant a statutory notice of demand pursuant to s. 218 of the Companies Act 1965. Then on 27 February 1992, the respondent presented a petition for winding-up of the appellant, on the ground that the sums demanded in the notice

have not been paid by the appellant company. The appellant disputed the validity of the s. 218 notice. On 6 May 1996 the High Court ordered that the appellant be wound up. By consent, the winding-up order was stayed pending appeal to this court.

The issue to be decided is whether s. 218(2)(a) of the Companies Act 1965, is to be interpreted literally and strictly or liberally and widely.

The presumption under s. 218(2)(a) that the Company was unable to pay its debts and hence insolvent arose once it is established that:

(i) a sum exceeding RM500 was due;

(ii) a demand had been made in the manner provided by s. 218(2)(a); and

(iii) the debtor company neglected to pay the amount demanded within three weeks.

It is the submission of learned counsel for the appellant that s. 218(2)(a) ought to be interpreted strictly. He further submits that the statutory demand under s. 218 requires the "sum so due" to be clearly specified and quantified and that no sums whatsoever ought to be left to be calculated and/or ascertained by the recipient of the notice. Failure to do this would result in the statutory notice to be invalid to raise the statutory presumption under s. 218(2)(a) of the company's inability to pay its debts. It is the contention of learned counsel for the appellant that the statutory notice of demand in the instant case contains a sum in excess of what is actually due and that the notice read with the petition and affidavits in support of the petition shows that the sum demanded in the notice is excessive. In the event he contends that the notice is invalid to raise the statutory presumption under s. 218(2)(a).

On the contrary learned counsel for the respondent submits that failure of the respondent to quantify the interest due on the judgment sum, does not render the statutory notice invalid and that the amount mentioned in the notice is sufficient compliance with the requirements of s. 218(2)(a) and not uncertain. In other words the submission on behalf of the respondent is that s. 218(2)(a) ought not to be interpreted strictly but to be interpreted liberally or widely.

There are a number of cases both local and overseas on the interpretation of s. 218(2)(a). In *Re Yap Kim Kee & Sons Sdn. Bhd.* [1990] 2 MLJ 108, Zakaria Yatim, J (as he then was) following the Australian case of *Re Willes Trading* [1977-78] ACLC held that s. 218(2)(a) must be interpreted strictly. He emphasised this approach later in *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178. Learned counsel for the appellant submitted before

us that Zakaria Yatim J's decision in both the above cases was endorsed by the Supreme Court in *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1992] 1 CLJ 637; [1992] 1 MLJ 313. He also submits that the Supreme Court adopted the strict interpretation of s. 218(2)(a).

On our reading of *Sri Hartamas*, we find that the facts are on all fours with the facts in the present appeal. On 12 July 1988 the respondents obtained judgment against the appellants for the sum of $5,197,060.82 together with interest and costs. By a letter dated 24 December 1988, the respondents sent to the appellants a demand under s. 218(2)(a) of the Companies Act 1965. The demand was served on the appellants on 27 December 1988. As the appellants failed to pay the debts demanded, the respondents presented a petition dated 17 January 1989 to wind up the appellants on the ground that the appellant had failed to comply with a statutory demand and was therefore insolvent and unable to pay its debts. The High Court granted the petition. It is pertinent at this stage to set out the statutory notice in the *Sri Hartamas* case in toto as it is similar to the notice of demand in the present appeal.

> To: Sri Hartamas Development Sdn. Bhd.
>
> 3rd Floor
> Wisma Low Kim Her
> 225-227 Jalan Tun Sambanthan
> 50470 Kuala Lumpur.
>
> Take notice that, We, Messrs. Cheang & Ariff of 18th Floor, Plaza MBF, Jalan Ampang, 50450 Kuala Lumpur, solicitors for MBf Finance Bhd. hereby requires you to pay to us the principal sum due to a final judgment dated 12 July 1988 obtained by MBf Finance Bhd. against you in the High Court at Kuala Lumpur in Civil Suit No. D4-23-2067-87 that is to say the sum of M$5,197,060.82 together **with interest thereon at the rate of 17% p.a. from 1 December 1986 until the date of realization** and cost at M$400 whereon execution has not been stayed or you must secure or compound for the aforesaid sum to the satisfaction of the said MBf Finance Bhd. within 21 days of the date hereof and that the consequences of not complying with the requisition of this notice are that winding up proceedings may be taken against you.
>
> Dated 24 December 1988.
>
> Sgd. Messrs. Cheang & Ariff
>
> Solicitors for MBf Finance Bhd.
>
> (The bold is ours)

This statutory notice is similar to the notice in the present appeal except for the judgment sum which was RM334,118.79 "together with interest thereon at the rate of 8% per annum from 28 October 1988 until date of payment.". Now the dispute in the *Sri Hartamas* notice was that it gave a period of 21 days, from the date of the notice whereas the section provides for three weeks after service of the demand to pay the sum due.

The Supreme Court while endorsing that s. 218(2)(a) ought to be strictly interpreted went on to say that a demand does not fall within s. 218(2) if the amount demanded exceeds the sum actually due, and held that in that case the statutory demand was not bad or invalid, as it was made in writing and was signed and delivered at the registered address of the appellants and it had specified the actual amount due. We believe what the Supreme Court was saying is that the amount due is the judgment sum including interest. Although the statutory notice in *Sri Hartamas* did not quantify the interest due, nevertheless the Supreme Court held that it was a good and valid notice. In the final analysis the purpose of the statutory notice is to demand the judgment sum inclusive of the interest, quantified or otherwise, and if not paid within the stipulated period of three weeks, is to warn the debtor of an impending petition. Had the notice mentioned a sum in excess of the judgment sum then such notice would not have strictly complied with s. 218(2)(a) and thus would be bad and invalid. We are bound by the decision in *Sri Hartamas*. Since the notice in the present appeal is similar with that in *Sri Hartamas,* we hold that the notice, although it did not quantify the interest due, was made in writing and was signed and delivered by the respondent's authorised agent at the appellant's registered address and it has specified the actual sum due which was not disputed, was a good and valid notice. Section 218(2)(a) only provides that a demand under the hand of the creditor or under the hand of his agent lawfully authorised, must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. It is our view that it makes no difference whether the interest is quantified or not.

A similar situation arose in *United Malayan Banking Corporation Berhad v. Richland Trade & Development Sdn. Bhd.* (unreported) where the Court of Appeal, following the Supreme Court's decision in *Sri Hartamas,* adopted the strict interpretation and held that the failure to quantify the interest does not render the demand of its real purpose and objective. The Court of Appeal further held that:

> In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due **(no mention is made of quantifying it to the last cent)**. The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a winding-up petition would follow. (the bold is ours).

The decision on the interpretation of s. 218(2)(a) in the *Richland's* case was affirmed by the Federal Court at its sitting on 21 October 1999 though the appeal was allowed on a different ground, ie, on the issue of the service of the notice of demand. (See [2000] 1 CLJ 57.).

In the present appeal we hold that the requirements of the section relating to demand has been similarly complied with. Therefore we see no merits in the argument that since the interest is not quantified the notice is bad and invalid. We would like to reiterate that even by the non-quantification of the interest in the notice, the respondents had strictly complied with the requirements of s. 218(2)(a). We, therefore, dismiss the appeal with costs and order the deposit to go to the account of taxed costs.